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Anne S. Jordan

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ENCYCLOPAEDIA BRITANNICA, INC. V. FTC— BEYOND A “REASONABLE REMEDY”?

The authority of the Federal Trade Commission (referred to as FTC or Commission) to require advertisers to correct misleading advertising by ordering disclosure of certain product information has long been recognized.¹ The United States Supreme Court's recent extension of first amendment protection to commercial speech has brought into question the scope of the FTC's regulatory authority in this area.² Although two courts of appeals have subsequently upheld the imposition of corrective advertising orders,³ a more stringent type of affirmative disclosure,⁴ the extent of the FTC's authority remains undetermined.⁵ Because the Commission intends to con-

1. *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (company required to disclose that it only packaged, and did not grind, flour as its name implied); *National Comm'n on Egg Nutrition v. FTC.*, 570 F.2d 157 (7th Cir. 1977) (controversy among medical experts concerning the effect of cholesterol on health must be disclosed), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (company had to disclose that its mouthwash did not prevent colds), *cert. denied*, 435 U.S. 950 (1978); *Johnson Products Co. v. FTC*, 549 F.2d 35 (7th Cir. 1977) (company required to issue warning about its hair care products); *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.) (imported watches had to indicate country of origin to avoid confusion with original domestic company with the same name), *cert. denied*, 375 U.S. 944 (1963); *Keele Scalp & Hair Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960) (limited efficacy of treatment for baldness required to be disclosed); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (limited efficacy of treatment for baldness had to be disclosed), *cert. denied*, 364 U.S. 827 (1960); *Bantam Books, Inc. v. FTC*, 275 F.2d 680 (2d Cir.) (abridged and retitled books required to be clearly labeled as such), *cert. denied*, 364 U.S. 819 (1960); *L. Heller & Son, Inc. v. FTC*, 191 F.2d 954 (7th Cir. 1951) (foreign pearls had to be labeled as imported). See note 9 *infra*.

2. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

3. In *Egg Nutrition*, the National Commission on Egg Nutrition was required to disclose in future advertising that a controversy existed among medical experts over the relationship between egg consumption and heart disease. 570 F.2d at 165-67. In *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), Warner-Lambert was required to state in \$10 million of its advertising: "Listerine will not help prevent colds or sore throats or lessen their severity." *Id.* at 753.

4. The term "affirmative disclosure" refers to the correction of factual misrepresentations inherent in advertising or labeling by requiring more complete disclosure, while the term "corrective advertising" usually describes an order requiring an advertiser to make certain statements to discredit claims made, or the image created by, prior advertising. The limited duration of corrective advertising further distinguishes it from affirmative disclosure. See generally Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496 (1972) [hereinafter cited as *Limits of FTC Power*]; Note, *Warner-Lambert Co. v. FTC: Corrective Advertising Gives Listerine a Taste of its Own Medicine*, 73 NW. U.L. REV. 957 (1978) [hereinafter cited as *Listerine*].

5. See Elman, *The New Constitutional Right to Advertise*, 64 A.B.A. J. 206 (1978) [hereinafter cited as Elman]. In *Virginia State Board*, the Court noted that "some forms of commercial speech regulation are surely permissible." 425 U.S. at 770. The Court also recognized that the difference between commercial speech and other types of speech traditionally protected by the first amendment might "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary

tinue to seek affirmative disclosure and corrective advertising remedies,⁶ and because Congress desires to curb what is considered FTC "harassment" of business,⁷ the Commission's authority will no doubt continue to be frequently litigated.

In *Encyclopaedia Britannica, Inc. v. FTC*,⁸ the United States Court of Appeals for the Seventh Circuit upheld the FTC's extension of affirmative disclosure to remedy deceptive practices in the direct selling industry. The order upheld by the court dictates the format and wording of future advertising and requires salespersons to clearly state the purpose of their visit to a prospective purchaser's home. This order departs from FTC practice in that affirmative disclosure traditionally has been imposed by the Commission when the deception created by misleading advertising or labeling survived the discontinuance of the unfair or deceptive practice.⁹ In such cases, cease and desist orders are often considered ineffective because they do not correct consumers' lingering reliance on advertising that may motivate subsequent purchasing decisions.¹⁰ *Encyclopaedia Britannica* is not, however,

to prevent its being deceptive." *Id.* at 771 n.24. *Accord*, *Friedman v. Rogers*, 441 U.S. 917 (1979); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

6. See [1979] 936 ANTITRUST & TRADE REG. REP. (BNA) A-7. The Commission, however, has not set forth the guidelines it will follow in invoking the corrective advertising or affirmative disclosure remedies; rather, it will seek such remedial action on a case by case basis. *Id.*

7. In discussing recent congressional concern over FTC action, evidenced by the delay in granting funds for the Commission, one author notes: "FTC chairman Michael Pertschuck . . . last month before Senator Ford's subcommittee . . . made a number of concessions, including a startling one that some FTC staffers now gone from the agency had conducted what amounted to a 'vendetta' against some industries subject to FTC rules." Gordon, *FTC: 1 Step Behind National Mood?*, *Advertising Age*, Oct. 29, 1979, at 3.

8. 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1329 (1980).

9. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). Although it is difficult to generalize, the form of an affirmative disclosure order can usually be characterized in one of three ways. First, affirmative disclosure can correct either product labeling or advertising that factually misrepresents the nature, content, or origin of the product, or it can correct a truthful advertisement or label which is deceptive because of the way it might be interpreted. See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (labels in clothes required to show fabric content); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (manufacturer of device to stop bedwetting had to disclose its limited efficacy); *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922) (manufacturer of baking powder required to relabel product where product content was changed after 60 years of advertising the superiority of the original formula). See also cases cited in note 1 *supra*. Second, affirmative disclosure can counteract years of deceptive advertising. This is termed corrective advertising and is an admission by an advertiser that prior claims were untrue because the advertised product cannot perform as promised. See, e.g., *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977). See generally Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971) [hereinafter cited as "Corrective Advertising" Orders]. Third, affirmative disclosure may publicize that a company is subject to an FTC order as a result of engaging in unfair trade practices. See, e.g., *STP Corp.*, [1978] 3 TRADE REG. REP. (CCH) ¶ 21,390. See generally Lemke, *Souped Up Affirmative Disclosure Orders of the F.T.C.*, 4 U. MICH. J.L. REF. 180 (1970) [hereinafter cited as Lemke].

10. See Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 696 (1977) [hereinafter cited as Pitofsky]; "Corrective Advertising" Orders, *supra* note 9, at 484; *Listerine*, *supra* note 4, at 962-66.

such a case because it is unlikely that direct selling practices will affect future purchasing behavior.

This Note examines the propriety of an affirmative disclosure remedy in the direct selling context, focusing on the authority of the Commission to take such action without articulating the basis for its decision or demonstrating the efficacy of the remedy. In addition, it discusses the constitutionality of the order and the economic repercussions likely to follow from the imposition of such an order on a single member of an industry. This Note proposes that the courts take a stronger role in reviewing the legality of FTC orders in light of the increasing impact of that agency's action. Further, it suggests that when the need for stringent consumer protection measures is indicated, the FTC should redress the injury through rulemaking procedures requiring the adherence of an entire industry, rather than proceeding piecemeal against one of several competitors.¹¹

HISTORICAL BACKGROUND

The FTC was created in 1914 by Congress' enactment of the Federal Trade Commission Act (FTC Act), intended primarily to supplement existing

Profits realized by a company using a deceptive practice between issuance of a complaint and entry of a final order have been termed "delay profits." *"Corrective Advertising" Orders*, *supra* note 9, at 483. Because FTC proceedings can be protracted when vigorously contested, "delay profits" may be substantial. Yet, profits from deceptive practices are usually unrecoverable because cease and desist orders cannot be applied retrospectively. *Id.* at 482-84. Affirmative disclosure is used, therefore, to dissipate the effect of the prior deception on subsequent profits.

Affirmative disclosure serves a deterrent function as well. The FTC recently published the results of a study evaluating the impact of advertisements run by STP Corporation pursuant to a consent order entered into with the Commission. STP Corp., [1978] 3 TRADE REG. REP. (CCH) ¶ 21,390. The company was required to spend \$200,000 to print an advertisement entitled "FTC NOTICE" which stated: "As a result of our investigation by the FTC into certain allegedly inaccurate past advertisements for STP's oil additive, STP Corp. has agreed to a \$700,000 settlement to avoid protracted litigation." The advertisement further stated that although STP may have relied on inaccurate test data in claiming that users of its product realized reduced oil consumption, the settlement was not an admission that the company had violated the law. [1978] 851 ANTITRUST & TRADE REG. REP. (BNA) A-9. Those surveyed to determine the effect of the corrective advertising were aware of the problem STP had experienced, but could not recall the advertisement itself. The survey found better recall among businessmen and advertising executives who felt they had learned from STP's experience. [1979] 930 ANTITRUST & TRADE REG. REP. (BNA) A-16. The main impact of the "notice" advertisements was, therefore, to insure the reliability of subsequent STP advertising and to warn advertisers of possible embarrassing and costly consequences of engaging in deceptive advertising. [1978] 831 ANTITRUST & TRADE REG. REP. (BNA) A-10.

11. Pursuant to its rulemaking authority, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C.), the Commission has power to promulgate rules defining unfair or deceptive practices within the meaning of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976) [hereinafter referred to as FTC Act].

One essential difference between adjudication and rule-making is their scope of application. While adjudicatory proceedings bind only the company against which an order issues, trade regulation rules are binding on all companies engaged in the conduct which the rule proscribes.

enforcement of antitrust laws.¹² Although some early case law suggested that the FTC had authority to regulate unfair practices injurious not only to competitors, but also to consumers,¹³ it was not until the Wheeler-Lea Amendments in 1938 that Congress amended section 5 of the FTC Act to grant the FTC authority to regulate practices considered unfair or deceptive to consumers.¹⁴ From this legislation the FTC derives its authority to regulate advertising and selling practices,¹⁵ and it generally implements its statutory mandate by ordering violators to cease and desist from engaging in

12. FTC Act, ch. 311, § 5, 38 Stat. 719 (1914). The Act prohibited "unfair methods of competition." *Id.* For a discussion of the legislative history of the Act, see *Limits of FTC Power*, *supra* note 4, at 505-09; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1019-21 (1967) [hereinafter cited as *Developments*].

13. In *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922), the Supreme Court held that an industry-wide practice of labeling a wool blend fabric as "all wool" was an unfair method of competition because it misled the public. *Id.* at 491-93. The Court also noted, however, that truthful competitors were affected by the misleading labeling as well. *Id.* at 494. In *FTC v. Klesner*, 280 U.S. 19 (1929), the Supreme Court held that the FTC could attack a company's practice as unfair even though the company's competitors would not have a private right of action. *Id.* at 25. The Court affirmed the dismissal of the complaint, however, because the public interest involved was neither specific nor substantial. *Id.* at 28. Yet, in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), the Court held that "[t]he paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected" *Id.* at 647-48.

14. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (1938). The amendments extended the FTC's authority beyond the "unfair methods of competition" proscribed by the 1914 Act to "[u]nfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (1976).

15. For a thorough discussion of practices found deceptive or unfair, see Annot., 65 A.L.R.2d 225, 253-306 (1959). The determination of whether a practice is deceptive or unfair within the meaning of § 5 of the FTC Act, 15 U.S.C. § 45 (1976), is left exclusively to the Commission, and the general language of the Act affords the Commission wide latitude in defining its parameters. The FTC can evaluate the deceptive character of an advertisement on the basis of information in the record or within its general knowledge. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946). The deception can be express or implied, *Spiegel, Inc. v. FTC*, 411 F.2d 481 (7th Cir. 1969), and can result from truthful as well as false or misleading statements, e.g., *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922). When an advertisement is susceptible of more than one interpretation and when one inference is deceptive, the advertisement will be found to violate § 5. *Floersheim v. Weinburger*, 346 F. Supp. 950 (D.D.C. 1972).

The Commission need not offer objective proof of an advertisement's deceptive nature. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965). Further, courts have stated that "advertisements are not to be judged by their effect upon the scientific or legal mind . . . but rather by their effect upon the average member of the public." *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir. 1960). This "average person" standard has, however, been substantially diluted so that "if anyone of any intelligence level could find and believe a misleading connotation, the advertiser apparently must be prepared to defend that connotation." Gurol & Mann, *An Objective Approach to Detecting and Correcting Deceptive Advertising*, 54 NOTRE DAME LAW. 73, 75 (1978) [hereinafter cited as Gurol & Mann] (quoting Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 460 n.93 (1964)). The Commission's initial determination of deception is, therefore, almost impervious to attack. For a thorough discussion of the standards used by the FTC, see *Developments*, *supra* note 12, at 1039-63.

illegal conduct.¹⁶ Neither the statutory language nor the legislative history indicate congressional intent to grant the Commission remedial power beyond cease and desist orders.¹⁷ The judiciary has, however, interpreted

16. FTC Act, § 5(b), 15 U.S.C. § 45(b) (1976). For a discussion of the Commission's procedures in issuing orders, see *Developments*, *supra* note 12, at 1073-85; *United States v. J.B. Williams Co.*, 498 F.2d 414, 441 (2d Cir. 1974). See also 16 C.F.R. § 2.31 (1980) (consent orders); 16 C.F.R. § 3.46 (1980) (orders following adjudicatory proceedings); E. ROCKEFELLER, *DESK BOOK OF FTC PRACTICE AND PROCEDURE* 101-09 (3d ed. 1979).

17. See *Limits of FTC Power*, *supra* note 4, at 505-11. Despite differing views of members of the House and Senate, "[d]ebate on the final version of the trade commission bill indicated that others of the bill's drafters did not understand the power to issue cease and desist orders to include authority to regulate future conduct." *Id.* at 508-09. The legislative history of the FTC Act also makes clear that Congress intended the Commission's power to be exercised only prospectively and in a remedial, not a punitive, manner. *Id.* at 508. The Supreme Court in *United States v. Ruberoid Co.*, 343 U.S. 470 (1952), recognized Congress' intent, stating: "Orders of the FTC are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." *Id.* at 483. See also *FTC v. Cement Inst.*, 333 U.S. 683, 726 (1948). Orders aimed at deceptive practices which have the effect of dissipating prior profits would be retroactive and, therefore, beyond the FTC's authority. Arguably, corrective statements concerning the product have just this effect. See *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

The FTC attempted to blur this prospective-retrospective distinction in *Curtis Publishing Co.*, 78 F.T.C. 1472, 1512-18 (1971), stating:

Every Commission order is "retrospective" in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and is at the same time "prospective" in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future.

Id. at 1514. And, in *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), the Commission concluded that an order with the purpose and effect of terminating a continuing public injury is not retrospective at all. A former Director of the Bureau of Consumer Protection of the FTC has further argued that the requirement that orders be prospective only lacks basis in judicial or agency interpretations of FTC authority. Pitofsky, *supra* note 10, at 695. Despite disagreement about what is or is not retrospective, courts have had no difficulty in upholding affirmative disclosure and corrective advertising orders. See cases cited in note 1 *supra*.

The distinction between remedial and punitive FTC orders is more difficult to ascertain. After all, what might be punitive for remedying a minor violation of § 5, might be remedial if imposed on a company frequently charged with engaging in deceptive practices. Yet, the court in *All-State Indus. of N.C., Inc. v. FTC*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970), refused to modify or set aside an order "despite its severity" because the Commission considered the order necessary to protect the public. Reaching the opposite conclusion, an administrative law judge in *Sun Oil Co.*, 84 F.T.C. 247 (1974), refused to order corrective advertising, concluding that a broad order of longer duration than necessary to remedy consumer injury would have been punitive.

Although recent court decisions and Commission opinions discussed above have eroded the retrospective-prospective distinction, it remains clear that Commission orders must still serve a remedial function. An overly broad remedy still can be modified or set aside by a reviewing court as punitive. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962); *Heater v. FTC*, 503 F.2d 321, 324 (9th Cir. 1974); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971); *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1961).

the FTC Act as a grant of such authority.¹⁸ Ample precedent, therefore, supports the FTC's authority to order affirmative disclosure.¹⁹

18. Early cases considered the extension of the Commission's authority beyond cease and desist orders in the context of the enforcement of antitrust laws. In *FTC v. Eastman Kodak Co.*, 374 U.S. 619 (1977), the Court found the Commission's authority expressly confined to that conferred by the statute. In striking down a divestiture order against Kodak, the Supreme Court held that the Commission had not "been delegated the authority of a court of equity." *Id.* at 623. The Court adhered to this view of administrative authority in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). There, the Court held that although Congress had granted the SEC discretionary power to regulate stockholder behavior, the Commission could not invoke general equitable powers on a case by case basis to proscribe certain actions. *Id.* in 1963, the Court changed its approach. In *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963), the Court held that under the statute granting regulatory power to the Civil Aeronautics Board, Congress gave the Board authority only to issue cease and desist orders. "Authority . . . ample to deal with the evil at hand" was inferred by the Court from congressional intent to enable the board to effectively regulate the airline industry. *Id.* at 312. Thus, "the power to compel divestiture" did not have "to be explicitly included in the powers of the administrative agency to be part of its arsenal of authority." *Id.* at 312 n.17.

Similarly, in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), the Supreme Court recognized the power of the FTC to go beyond its statutorily conferred cease and desist authority. Finding that *Eastman Kodak* had been repudiated by later cases, the *Dean Foods* Court affirmed the FTC's power to seek a preliminary injunction blocking a proposed merger as a prerequisite to the agency's effective discharge of its responsibilities. *Id.* at 606 n.4. This same FTC authority was recognized by the Seventh Circuit in *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971), where the court upheld a Commission divestiture order. The Court specifically referred to the equitable power of the FTC in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). There, the Court held that:

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but Congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

Id. at 244. In *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969), the Sixth Circuit affirmed another exercise of the Commission's implied authority by upholding a mandatory licensing order. The FTC also prevailed recently over a challenge to its order limiting the dollar amount of Arthur Murray's consumer contracts to \$1500. *Arthur Murray Studios of Wash., Inc. v. FTC*, 458 F.2d 622 (5th Cir. 1972). In these cases, dealing primarily with antitrust violations, the courts have significantly expanded the authority of the FTC.

19. The first affirmative disclosure case was decided in 1922. *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922). For over 60 years, Royal Baking Powder had advertised its product as superior to baking powders containing phosphate. The company subsequently included phosphate in its product and simultaneously stopped the advertising and labeling used when the product was phosphate-free; however, the FTC required the label and advertising to include "phosphate" in the product name. *Id.* at 746-49. The FTC stated that only in this way could consumers' mistaken belief about the actual nature of the product be dispelled. *Id.* at 749-50.

Another early affirmative disclosure order was imposed in *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933). In *Royal Milling*, the Commission initially issued a cease and desist order barring use of the company's tradename. The company then sought modification of the order to allow retention of the tradename. The company claimed that disclosure of the fact that the company did not mill, but only packaged, flour would sufficiently eliminate the deception. The

Courts reviewing FTC orders can affirm, modify, or set aside an order when the Commission has abused its discretion.²⁰ The United States Supreme Court, in *Jacob Siegel Co. v. FTC*,²¹ held that the Commission's

Supreme Court ordered the modification as requested by Royal Milling, *id.* at 217, and the case was remanded to the Commission to determine the form of the disclosure.

Alberty v. FTC, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950), was the first decision to limit the Commission's authority to order an advertiser to include negative statements about its product in its advertising. The Court distinguished "the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity," and held that "Congress gave the Commission the power of the former but did not give it the latter." *Id.* at 39. *Alberty* did not, however, signal a trend toward limiting the FTC's power. Subsequent cases either distinguished *Alberty* based upon the statute under which suit was brought, *FTC Act*, § 15, 15 U.S.C. 55 (1976) (concerning drug labeling), or upon the strength of the FTC's evidence supporting the alleged deception, evidence found unpersuasive in *Alberty*. See *Feil v. FTC*, 285 F.2d 879, 898-99 (9th Cir. 1960); *Keele Scalp & Hair Specialists, Inc. v. FTC*, 275 F.2d 18, 23 (5th Cir. 1960); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960). See also "Corrective Advertising" Orders, *supra* note 9, at 489-90.

Since these early decisions, the Commission has had success in obtaining even more stringent affirmative disclosure orders against a number of companies. In most of these cases, the deception remedied resulted from claims of product efficacy, usually reinforced by extensive advertising. While the claim itself was truthful, the product produced the claimed beneficial results only in limited circumstances. Thus, in *J.B. Williams Co.*, the makers of Geritol had advertised the beneficial effect of an iron supplement for women who felt tired. The FTC order, affirmed by the Sixth Circuit, required disclosure that the great majority of people who feel tired do not suffer from an iron deficiency. 381 F.2d 884, 890 (6th Cir. 1967). Recently, the FTC has sought more stringent types of affirmative disclosure orders, particularly those requiring corrective advertising. See, e.g., *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). One of the strongest orders to date, entered in *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), required the makers of Listerine to expend \$10 million to advertise that their product was not effective as a cold remedy. Similarly, the FTC has sought, and in one case obtained, consent orders against companies requiring them to disclose in subsequent advertising that the FTC has found their prior advertising deceptive. See the discussion of the order entered against STP Corporation in note 10 *supra*. See also *Lemke*, *supra* note 9.

20. Courts may not evaluate the "correctness" of the Commission's decision because an administrative agency's findings of fact are conclusive if supported by the evidence. 15 U.S.C. § 45(c) (1976); *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937); *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

21. 327 U.S. 608 (1946). At issue in *Siegel* was whether the FTC could order excision of a tradename used by the company for its line of coats. The Commission found the tradename deceptive because it implied that the coats were made from one fabric when in fact another was used. The Court applied the "reasonably related" standard narrowly, holding that despite the Commission's expertise to determine what was necessary to eliminate the unfair or deceptive practice, business assets (the company's tradename) were to be afforded the full protection of the law. This protection prevented destruction of those assets when less severe remedial measures would affect the same result. The Court remanded the case to the Commission to determine if the deception could be eliminated by modifying the tradename in some way. *Id.* at 612-14. *Accord*, *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Magnaflco Co. v. FTC*, 343 F.2d 318 (D.C. Cir. 1965); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787 (2d Cir. 1959). See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 268-69 (1965). See also "Corrective Advertising" Orders, *supra* note 9, at 497-99 (discussing the "standard of necessity" which evolved from the ruling in *Siegel*).

exercise of discretion was to be viewed in light of its expertise in regulatory matters, stating that "courts [should] not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."²² Courts following *Siegel* have applied the "reasonably related" standard, reaching varying results.²³ Although a broad reading of *Siegel* suggests that courts should uphold orders that have a possibility of remedying a violation, a narrow interpretation would require that an FTC remedy go no further than necessary to correct a violation.²⁴ Courts applying the "reasonably related" standard, however, have done so in light of the great deference traditionally accorded the Commission in fashioning remedies.²⁵

To enable a reviewing court to determine whether the Commission abused its discretion in issuing an order, the FTC is required by statute to include in its rulings a statement of its findings and conclusions, and the basis on which they rest.²⁶ Some courts have held that this statute mandates findings and conclusions regarding the FTC's choice of a particular remedy.²⁷ Other courts have found that the statute is satisfied if the remedy ordered is likely to prevent recurrence of the violation.²⁸ The majority

22. 327 U.S. at 613.

23. *FTC v. Ruberoid Co.*, 343 U.S. at 473 (order which was understandable, reasonably related to the facts, and within the Commission's discretion was affirmed); *Floersheim v. FTC*, 411 F.2d 874, 878 (9th Cir. 1969) (order was found reasonably calculated to end deception and was therefore affirmed), *cert. denied*, 396 U.S. 1002 (1970); *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (although court might have imposed a different remedy, where a reasonable relationship existed between the violation and the remedy, the order had to be approved). *But cf. Fedders Corp. v. FTC*, 529 F.2d 1398, 1402 (2d Cir. 1976) (the overall concept of reasonableness requires narrowing overbroad orders to more closely relate to proscribed conduct); *Arthur Murray Studio of Wash., Inc. v. FTC*, 458 F.2d at 625 (order should be no broader than reasonably necessary when it restricts lawful activity); *Magnaflco Co. v. FTC*, 343 F.2d at 320 (ordinary fairness required consideration of less severe remedy); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787, 791 (2d Cir. 1959) (Commission abused its discretion in not considering a less stringent remedy).

24. See cases cited in note 23 *supra*.

25. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 385; *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *FTC v. Ruberoid Co.*, 343 U.S. at 473.

26. 5 U.S.C. § 557(c) (1976).

27. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) (case remanded because ICC failed to justify the imposition of a more burdensome remedy); *Gilbertville Trucking Co. v. United States*, 371 U.S. at 129-31 (case remanded because record failed to show whether alternative remedies were considered); *Papercraft Corp. v. FTC*, 472 F.2d 927, 933 (7th Cir. 1973) (order modified because no showing was made that the extreme remedy of divestiture was necessary); *Magnaflco Co. v. FTC*, 343 F.2d at 320-21 (case remanded for consideration of alternative remedies other than total excision of petitioner's tradename); *Elliot Knitwear, Inc. v. FTC*, 266 F.2d at 791 (case remanded to Commission to determine if modification rather than excision of tradename would eliminate deception).

28. *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391-93 (1959) (activities related to those found to be illegal can be prohibited as a preventive measure); *FTC v. National Lead Co.*, 352 U.S. at 429 (to prevent recurrence of illegal practices, legal as well as illegal conduct can be prohibited); *L.G. Balfour Co. v. FTC*, 442 F.2d at 23 (divestiture upheld despite other available remedies); *Niresk Indus., Inc. v. FTC*, 278 F.2d at 343 (broad order upheld to prevent petitioner's use of similar illegal practices in other areas of its business).

of courts faced with this issue have adhered to the latter, holding that the basis on which the Commission's ruling rests is the factual determination of a violation in need of correction.²⁹

Since the United States Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³⁰ extended first amendment protection to commercial speech, reviewing courts have been faced with determining the constitutional validity of FTC orders. The Court in *Virginia State Board* only briefly discussed the scope of such protection, but was quick to point out that nothing in the ruling prevented state regulation of false or deceptive advertising.³¹ Although the full extent of first amendment protection has not been determined, it is clear from courts of appeals decisions applying *Virginia State Board* that the Commission's remedies, even for deceptive advertising, can go no further than necessary to eliminate the deception.³² What some early courts determined a "reasonable relation"³³—no more stringent a remedy than was necessary to prevent the deceptive act or practice—has now become constitutional mandate.³⁴

29. See cases cited in note 28 *supra*.

30. 425 U.S. 748 (1976).

31. See note 5 *supra*.

32. *United States v. National Soc'y of Professional Eng'rs*, 555 F.2d 978, 984 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). *Cf. Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (remedy that goes no further than necessary is not constitutionally required, although breadth of remedy is a basis for evaluating it), *cert. denied*, 435 U.S. 950 (1978).

In *Egg Nutrition*, an association hoping to promote egg consumption advertised that there was no scientific evidence proving that eating eggs increased cholesterol levels in the blood. The court struck down as overbroad the part of the order requiring the association to state affirmatively that many medical experts believed adverse health effects did result from cholesterol. The court stated that requiring the association to publicize the other side of the controversy would interfere with the advertiser's message. As modified, the order required only disclosure of the existence of a controversy surrounding the medical effects of eating eggs. This, in the court's opinion, adequately served the remedial purpose. 570 F.2d at 164.

The Court of Appeals for the District of Columbia reached a similar conclusion in *Professional Engineers*. Although the engineers' rule prohibiting competitive fee bidding was held to violate § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), the court held that the first amendment precluded the government from requiring the association to state affirmatively that it did not consider competitive fee bidding unethical, a statement contrary to its position. 555 F.2d at 984. In *Beneficial*, a heavily promoted, copyrighted phrase—"instant tax refund"—was ordered excised as the only means of eliminating the deception inherent in the slogan. The court found this remedy excessive and remanded the case to the FTC for consideration of a remedial order that would cure the deception by use of qualifying language. The court in *Beneficial* recognized that although the first amendment protection now extended to advertising is not a complete abrogation of the FTC's § 5 authority to regulate advertising, it does dictate that such orders receive greater scrutiny. 542 F.2d at 618-19.

33. See cases cited in note 27 *supra*.

34. See cases cited in note 32 *supra*. See also Elman, *supra* note 5, at 210. The author stated: "The First Amendment clearly requires the Commission to satisfy the heavy burden of showing that this prohibition is necessary to prevent deception, that it is the least restrictive remedy available, and that it does not unduly restrict the right to advertise truthfully." *Id.*

Although an FTC order may be affirmed on review as constitutionally valid and reasonably related, the court should further scrutinize the Commission's exercise of discretion when the violator will suffer impairment of its competitive position by complying with the order. The FTC can proceed against companies subject to its jurisdiction either individually in an adjudicatory proceeding or by industry-wide rulemaking.³⁵ Even though Supreme Court rulings accord great deference to the Commission when it proceeds against a single member of an industry,³⁶ the Commission's authority to prohibit one firm from engaging in what may be an industry-wide practice does not extend to the issuance of orders that would arbitrarily ruin one of many violators.³⁷ Most decisions applying this standard have held that the facts of the cases did not indicate that the Commission acted arbitrarily;³⁸ consequently, orders have rarely been attacked successfully on this ground. In only one instance has a showing of competitive detriment resulted in modification of an order to conform with the restrictions placed on a competitor.³⁹

35. See note 11 *supra*.

36. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958). In *Moog*, the Court held that "[i]t is clearly within the special competence of the commission to appraise the adverse effect on competition that might result from postponing a particular order [pending action against others in the industry] prohibiting continued violations of the law." *Id.* at 413. *Accord*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Johnson Products Co. v. FTC*, 549 F.2d 35 (7th Cir. 1977); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971); *Rabiner & Johnson, Inc. v. FTC*, 386 F.2d 667 (2d Cir. 1967). *Contra*, *Diener's, Inc. v. FTC*, 494 F.2d 1132 (D.C. Cir. 1974).

37. In *Universal-Rundle* the Supreme Court stated: "[T]he FTC does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." 387 U.S. at 251. *Accord*, *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971).

38. When courts fail to find that the Commission abused its discretion, the company challenging the order has usually shown that other members of the industry are engaged in similar conduct, but has not shown their conduct to be illegal. See *FTC v. Universal-Rundle Corp.*, 387 U.S. at 247. The Supreme Court further narrowed the use of the competitive disadvantage challenge to FTC orders, holding in *Universal-Rundle* that even a showing of widespread illegal industry practices and of substantial financial injury to the challenging company might not be sufficient ground to withhold enforcement. *Id.* at 251.

39. *Diener's, Inc. v. FTC*, 494 F.2d 1132 (D.C. Cir. 1974). In *Diener's*, the petitioner, an operator of several grocery stores, was prohibited from advertising certain prices as reduced. Because the order was more restrictive than one entered against one of Diener's competitors, the court modified it to allow Diener's to advertise in the same manner as the other grocery chain. *Id.* at 1134. See also *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972). There, the Commission itself gave a great deal of weight to possible competitive disadvantage in refusing to order corrective advertising. Firestone had used a tradename which implied that its tires were especially safe. Although the FTC ordered the company to cease and desist from further use of the tradename, corrective advertising was not considered appropriate because other tire manufacturers had used similar tradenames. *Id.* at 427-28. Despite its hesitancy to impose the more severe remedy of corrective advertising against one member of an industry, the Commission's recent approach is to proceed against companies individually in adjudicatory proceedings.

FACTS AND PROCEDURAL HISTORY OF *ENCYCLOPAEDIA BRITANNICA*

The petitioner, Encyclopaedia Britannica, markets its product exclusively through its direct selling network. The FTC's initial complaint against Encyclopaedia Britannica, issued in 1972, alleged a number of deceptive practices in violation of section 5 of the FTC Act.⁴⁰ On appeal to the United States Court of Appeals for the Seventh Circuit, however, Britannica challenged only the affirmative disclosure provisions of the Commission's order relating to its advertising and selling practices. The FTC found that Encyclopaedia Britannica generated names of prospective customers, "leads," through advertising purporting to solicit contest entries or requests for free books. While the ads were literally true—prizes were awarded in all of the contests and promotional publications were given away free⁴¹—the FTC found the advertisements deceptive because they failed to state that entering the contest or requesting literature might result in a salesperson visiting the entrant at home. The Commission also alleged that the failure of petitioner's salespersons to disclose immediately the purpose of their visit was a deceptive practice.⁴²

The Commission, upholding the administrative law judge's findings of deceptive practices,⁴³ concluded that a cease and desist order alone would not effectively remedy the deception and, therefore, it ordered affirmative disclosure.⁴⁴ All future advertising intended to generate leads was required to contain a warning that furnishing information might result in a sales call. The order stipulated the exact language to be used, as well as the precise format. A card imprinted with a similar warning was required to be presented by door-to-door salespersons when calling on a prospective purchaser.⁴⁵

In its appeal, Encyclopaedia Britannica argued that compliance with the affirmative disclosure order would result in drastic economic consequences.

40. Encyclopaedia Britannica, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,184 (1972). In addition to the selling and advertising practices challenged on appeal, the FTC alleged that Britannica's advertisements used in recruiting sales personnel misrepresented the nature of the employment offered, that there were abuses in the company's debt collection practices, and that Britannica engaged in deceptive pricing practices. Encyclopaedia Britannica denied some allegations and presented evidence that it no longer engaged in other alleged conduct. Appeal Brief of Petitioners at 8-10, *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979).

41. Appeal Brief of Petitioners at 16.

42. The Commission found that many salespersons gained entry to a prospect's home by soliciting the prospect's help in answering an advertising research questionnaire. Once the questionnaire was completed, the salesperson attempted to sell the prospect a set of encyclopaedias. Encyclopaedia Britannica responded by asserting that it heavily relied upon the questionnaire in gathering market research data valuable in developing sales and marketing plans. Some former salespersons called as witnesses by the FTC, however, remembered discarding the completed questionnaires, not returning them to the company. *Id.* at 6-7.

43. Encyclopaedia Britannica, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,119 (1976).

44. *Id.* at 20,978.

45. *Id.* at 20,974.

Specifically, it contended that its sales would be seriously affected because presenting the warning card was tantamount to informing a prospective purchaser that a high pressure sales pitch would follow.⁴⁶ In addition, the company asserted that it would lose qualified sales personnel who rely primarily on commissions for compensation. For these reasons, the company proposed less stringent disclosure vehicles, including use of regular business cards rather than 3 x 5 cards with the stipulated language, but the Commission rejected these proposals without explanation.⁴⁷

THE APPELLATE DECISION

On appeal to the United States Court of Appeals for the Seventh Circuit, Encyclopaedia Britannica challenged the FTC order primarily on four grounds: the authority of the Commission to impose a broad remedy when less stringent measures were available; the failure of the record to state the Commission's findings regarding the necessity or efficacy of the selected remedy;⁴⁸ the constitutionality of the order under the first amendment right

46. In preliminary tests conducted by Encyclopaedia Britannica, use of the prescribed language in advertising resulted in a 50% decline in the number of people responding. Appeal Brief for Petitioners at 52.

47. 605 F.2d at 971.

48. Encyclopaedia Britannica attacked the sufficiency of the record on another ground. It alleged that the Commission's case was based in part on an FTC internal memorandum entitled Analytical Program Guide for the Direct Selling Industry (APG). *Id.* at 974. Britannica contended that the Commission relied on this study in bringing suit and that it was denied the opportunity to rebut information about the direct selling industry contained in the study. *Id.* at 974-75.

In a collateral action, Britannica sought an injunction to stay the Commission's proceeding pending the outcome of a suit seeking to obtain disclosure of the APG under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). The injunction was denied, *Encyclopaedia Britannica Inc. v. FTC*, 517 F.2d 1013 (7th Cir. 1975), and the FTC prevailed initially on the merits in the FOIA suit. Britannica sought remand to the Commission of the affirmative disclosure suit pending final determination of the FOIA suit, currently on appeal to the Seventh Circuit.

The court, in refusing to remand the case, held that petitioners had failed to show that either the Commission or the administrative law judge were influenced in their decisions by any of the unreleased material. This finding was based on the opinion of the district court in the initial disclosure suit as well as the court of appeals' own evaluation of the disclosed material and summaries thereof. After an *in camera* inspection of the documents, the district court stated: "We have compared the contents of the APG with the allegations found in the Commission's complaint . . . and find them to be substantially dissimilar. . . . [T]hese seventeen documents do not contain private transmittals of binding Commission opinions or legal interpretations which in any fashion constitute secret agency law." 605 F.2d at 976. The court also cited *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926), and *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (because the FTC is required to perform certain public interest functions and is exposed to conceivably prejudicial influences, it must scrupulously focus on the issues of a case and avoid policy concerns), for the presumption of regularity surrounding the actions of public officials performed in their official capacities. 605 F.2d at 976. In *Chemical Foundation*, however, the presumption was raised in the context of the propriety of action taken by an official appointed by the executive during wartime regarding the administration of aliens' property. 272 U.S. at 4-8. The Court in *Chemical Foundation* was not concerned with administrative agency action.

to advertise; and the Commission's abuse of discretion in proceeding only against Encyclopaedia Britannica, and not against the industry as a whole.⁴⁹ The court of appeals rejected all of these arguments and affirmed the order.

The Seventh Circuit looked to the United States Supreme Court's decision in *Jacob Siegel Co. v. FTC*⁵⁰ for the standard used to evaluate the Commission's exercise of authority. The *Siegel* "reasonable relation" test requires that the remedy be related to the violation; if the requisite nexus is absent, the order will be set aside. Encyclopaedia Britannica urged the court to apply the "reasonable relation" test narrowly, as the *Siegel* court had done.⁵¹ The court of appeals recognized its authority to modify overbroad orders where the prohibited conduct had not been found violative of section 5,⁵² and cited cases requiring Commission orders to be no broader than necessary to eliminate deception.⁵³ The majority found more persuasive, however, cases holding that the Commission's authority to prohibit conduct extends beyond practices expressly found unlawful, to include all action that

The court in *Encyclopaedia Britannica* accepted the Commission's assurance that it had based its determination solely on the record in the case. 605 F.2d at 976. All parties to an administrative action are, however, entitled to have evidence relied on by an agency included in the record, 5 U.S.C. § 557(c) (1976). This is a particularly important consideration because the prosecutor, hearing officer, and reviewing body are all agency personnel who may have had access to the unreleased documents. See Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 809-10 (1971).

49. Encyclopaedia Britannica alleged that the Commission had abused its discretion in two ways. First, that the FTC arbitrarily singled out Britannica for discriminatory treatment, and, second, that Britannica's petition for rulemaking had been unjustifiably refused. 605 F.2d at 973. These allegations are, in essence, identical, because both question the propriety of the Commission's exercise of discretion.

50. 327 U.S. 608 (1946). See note 21 *supra*.

51. See note 21 *supra*.

52. 605 F.2d at 970 (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952)).

In *Ruberoid*, the Commission ordered the company to cease and desist from discriminatory pricing activity. Read literally, the order would have prevented Ruberoid from engaging in any price differentiation, even when justified by varying freight charges or meeting competitors' prices. The Court held that the Commission clearly did not intend its order to bar pricing practices not in violation of antitrust laws. The Court refused, however, to narrow the order to specifically reflect this conclusion because that would have enabled the violator to achieve the same result through slightly different, but legal, conduct. 343 U.S. at 473.

In *National Lead*, a case factually similar to *Ruberoid*, the Court expressly held that lawful conduct could be prohibited to prevent a recurrence of past illegal activities. 352 U.S. at 430. In *Colgate-Palmolive*, the Court refused to modify an order prohibiting deceptive simulated demonstrations of any Colgate products' effectiveness in television advertising. Since the deceptive techniques could have been adapted to any of Colgate's advertised products, the likelihood that a narrow order would have been circumvented was believed to be great. 380 U.S. at 395.

53. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *ITT-Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971).

would allow a violator to circumvent an order.⁵⁴ In particular, the Seventh Circuit relied upon *FTC v. National Lead Co.*,⁵⁵ which stated that a company found to have violated the Act "must expect some fencing-in."⁵⁶ Finding a reasonable relationship between the violation and the remedy based on a broad construction of the Commission's remedial power, the *Encyclopaedia Britannica* court held that the FTC's choice of a remedy was well within its discretion.

In addition, the court rejected *Encyclopaedia Britannica*'s challenge that the record was insufficient because it failed to show the efficacy of, or necessity for, the remedy.⁵⁷ The court accepted the Commission's finding that "clear and conspicuous disclosure" was needed to eliminate the deception, and held that such disclosure did "not unduly interfere with *Encyclopaedia Britannica*'s business operations."⁵⁸ The court also found the record to clearly imply that the FTC had considered remedial alternatives, but had rejected them as not effective. According to the majority, implied consideration of the alternatives sufficed—the statutory standard did not mandate an express comparison between the remedy imposed by the FTC and those suggested by the petitioner.⁵⁹ The majority rejected the petitioner's contention that the Supreme Court holding in *Burlington Truck Lines, Inc. v. United States*,⁶⁰ requiring reversal of a remedial order of the Interstate Commerce Commission (ICC) for that agency's failure to justify its choice of remedies, dictated a similar result in *Encyclopaedia Britannica*. By distinguishing *Burlington Truck Lines* on the basis of the remedial choices involved in that case,⁶¹ and by finding that the Commission impliedly considered the alternatives available in *Encyclopaedia Britannica*, the court refused to invalidate or remand the order.

Encyclopaedia Britannica further attacked the affirmative disclosure order as violative of its first amendment right to advertise. To determine the constitutionality of the FTC's order, the court examined the Supreme Court's ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

54. See note 52 *supra*.

55. 352 U.S. 419 (1957).

56. *Id.* at 431.

57. See text accompanying note 26 *supra*.

58. 605 F.2d at 971.

59. *Id.*

60. 371 U.S. 156 (1962).

61. The Interstate Commerce Commission (ICC), in *Burlington Truck Lines*, was faced with alleviating disruptions in trucking service resulting from labor problems between union and non-union carriers. Some union carriers had refused to provide connecting service for non-union trucking companies in areas where the non-union truckers were not certified to run. Rather than order the union truckers to cease and desist from refusing to haul freight for the non-union companies, the ICC granted new certification to the non-union truckers, thereby allowing them to run their trucks on what had been exclusively union routes. *Id.* at 163. The Supreme Court found the difference between a cease and desist order and new certification so great that the ICC's failure to articulate its reasons for choosing the more drastic of the two remedies required reversal of the order. It also rejected the ICC's argument that the cease and desist order would have been ineffective under the circumstances. *Id.* at 168.

Council,⁶² extending limited first amendment protection to commercial speech.⁶³ The court followed the literal holding of *Virginia State Board* that only truthful commercial speech is constitutionally protected. The court then examined lower court decisions, including a Seventh Circuit decision,⁶⁴ which held that a remedy, even for deceptive advertising, could extend no further than necessary to eliminate deception.⁶⁵ The court distinguished these cases on their facts by either the type of speech protected⁶⁶ or the content of the affirmative disclosure required.⁶⁷ Further, the court concluded that it was unable to determine that the order was not the least restrictive remedy available in light of the practices alleged, and held that the affirmative disclosure order did not infringe on petitioner's first amendment rights.

Encyclopaedia Britannica based its final challenge to the affirmative disclosure order on the ground that the Commission had abused its discretion by proceeding against one member of an industry to Britannica's substantial competitive detriment.⁶⁸ Britannica contended that the Commission should have sought to restrict Encyclopaedia Britannica's competitors similarly through its rulemaking procedure.⁶⁹ The court, however, looked to the strong precedent according deference to the Commission's discretion in this area,⁷⁰ even when it proceeds against only one member of an industry.⁷¹ Although the court in *Encyclopaedia Britannica* recognized that the Commission would abuse its discretion if it treated one violator differently from another,⁷² the court did not feel that Britannica had been subjected to discrimination. The court then looked to similar orders entered against P.F. Collier & Son Corporation⁷³ and Grolier, Incorporated,⁷⁴ competitors of

62. 425 U.S. 748 (1976).

63. See note 5 *supra*.

64. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

65. See note 32 *supra*.

66. Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976) (a copyrighted phrase).

67. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977) (original order would have required discussion of medical opinions of the dangers of eating eggs); United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir. 1977) (order originally required society to state that fee bidding was not ethical, a position it did not hold).

68. See notes 36-38 *supra*.

69. See note 11 *supra*.

70. 605 F.2d at 974 (citing *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958)).

71. See cases cited in note 36 *supra*.

72. 605 F.2d at 974 (citing *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 414 (1958) and *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971)).

73. *P. F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir. 1970). In *Collier*, the order affirmed by the Sixth Circuit required door-to-door salespersons to disclose verbally the nature of their visit. Although the company was charged with engaging in practices similar to those of Encyclopaedia Britannica, no written disclosure was required. The majority in *Encyclopaedia Britannica* accorded little significance to the less burdensome *Collier* order since that order was

Britannica. Citing these two orders, the court was unable to find that *Encyclopaedia Britannica* would be placed at a competitive disadvantage.

CRITICISM

One weakness in the *Encyclopaedia Britannica* decision hinges on the court's broad interpretation of the "reasonable relation" test set out in *Jacob Siegel Co. v. FTC*;⁷⁵ that the Commission's orders should be affirmed if reasonably related to preventing future illegal conduct.⁷⁶ The court in *Encyclopaedia Britannica* chose to follow the cases applying *Siegel* which have allowed the Commission to prohibit conduct beyond that expressly found unlawful in order to ensure the order's effectiveness.⁷⁷ The court's reliance on this line of cases was, however, misplaced. These cases primarily involved antitrust violations which might have continued in some other form absent a broad prohibitory order.⁷⁸ Courts reviewing trade cases in which substantial business assets were at stake have taken a narrower view of what is a reasonably related remedy.⁷⁹ Moreover, in two recent opinions, the Seventh Circuit narrowed orders that went further than reasonably necessary to end the violations.⁸⁰ The court in *Encyclopaedia Britannica* failed, however, to explain its departure from these narrow readings of the *Siegel* standard. Justice Wood, dissenting, concluded that the remedy exceeded the limits of the "reasonably related" standard, and was, therefore, punitive.⁸¹ In addition, he cited the Seventh Circuit's ruling in *Papercraft Corp. v. FTC*,⁸² striking down an FTC divestiture order because the Commission had failed to show the need for such an "exceptional remedy." Yet, in *Encyclopaedia Britannica*, the court affirmed the order despite the Commission's failure to show the necessity for, or greater efficacy of, the affirmative disclosure requirements.⁸³

Another criticism of *Encyclopaedia Britannica* stems from its analysis of the adequacy of Commission's record. The court, after reviewing the Commission's finding of the studied character of the deception and its conclusion that "clear and conspicuous disclosure" was required to eliminate the decep-

entered almost 10 years prior to *Encyclopaedia Britannica*, and was not considered by the FTC to be sufficiently effective. 605 F.2d at 974.

74. *In re Grolier, Inc.*, 91 F.T.C. 315 (1978), remanded to the FTC on other grounds, [1980] 1 TRADE CASES (CCH) ¶ 63,153 (9th Cir. 1980).

75. 327 U.S. 608 (1946).

76. See note 21 and accompanying text *supra*.

77. See cases cited in note 52 *supra*.

78. *Id.*

79. See cases cited in note 23 *supra*.

80. *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Papercraft Corp. v. FTC*, 472 F.2d 927 (7th Cir. 1973).

81. 605 F.2d at 977.

82. 472 F.2d 927 (7th Cir. 1973).

83. See Gurot & Mann, *supra* note 15, at 91-96 (proposing objective approach to evaluating the efficacy of a remedy).

tion, held that the record was sufficient in setting forth the basis for the agency's decision.⁸⁴ The court interpreted the controlling statute as requiring only a showing of the need for remedial action, rather than for the particular remedy chosen. This interpretation, however, seems contrary to the holdings of *Papercraft*⁸⁵ and *Burlington Truck Lines, Inc. v. United States*⁸⁶ that an agency must articulate its reasons for taking particular remedial action. Affirming the Commission's broad and burdensome order without notice of the reasons for such an order contravenes both the statutory and judicial standards.⁸⁷ Although the Commission cannot be expected to give reasons for or against every conceivable remedial choice,⁸⁸ in light of the statutory requirements,⁸⁹ prior case law,⁹⁰ and the economic interests at stake in *Encyclopaedia Britannica*,⁹¹ the court erred in failing to require the Commission to state why the less burdensome alternatives suggested by Britannica were unsuitable.⁹² Without knowing the rationale for the remedy imposed, the court could not correctly judge the Commission's exercise of authority pursuant to the statute.

The court in *Encyclopaedia Britannica* erred further in concluding that the affirmative disclosure order did not infringe upon petitioner's first amendment rights.⁹³ In refusing to extend first amendment protection to Encyclopaedia Britannica's advertisements, the court distinguished the commercial speech which had been protected in *Beneficial Corp. v. FTC*,⁹⁴ *National Comm'n on Egg Nutrition v. FTC*,⁹⁵ and *United States v. National Society of Professional Engineers*.⁹⁶ The court's distinctions were, however,

84. 605 F.2d at 971.

85. 472 F.2d 927 (7th Cir. 1973).

86. 371 U.S. 156 (1962).

87. The Court in *Burlington Truck Lines* recognized the danger inherent in agency action unaccompanied by disclosure of reasoning, stating "[e]xpert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." 371 U.S. at 167 (quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting) (emphasis in original)).

88. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 167-68; *Papercraft Corp. v. FTC*, 472 F.2d at 933. Counsel for the Commission argued that if the Commission had to justify its reasons for rejecting every possible available alternative (for example, why 3 x 5 instead of 3 x 4 cards were required), too great a burden would be imposed upon the FTC; therefore, the argument continued, only the practices being addressed by the remedial relief and not the various remedial choices need be articulated. Brief for Respondents at 33, *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979).

89. 5 U.S.C. § 557(c) (1976).

90. See note 27 *supra*.

91. See text accompanying notes 46 & 47 *supra*.

92. See cases cited in note 27 *supra*.

93. See text accompanying notes 62 & 63 *supra*.

94. 542 F.2d 611 (3d Cir. 1976).

95. 570 F.2d 157 (7th Cir. 1977).

96. 555 F.2d 987 (D.C. Cir. 1977).

artificial. First amendment protection should not hinge on the extent to which the affirmative disclosure order dictates the expression of a view contrary to that of the speaker, as was the case in *Professional Engineers*.⁹⁷ Nor should the court have considered the copyrighted phrase in *Beneficial* to be economically more significant than the interests at stake in *Encyclopaedia Britannica*. The content of the speech at issue in *Beneficial*, *Egg Nutrition*, and *Professional Engineers* was not determinative of first amendment protection; the courts in those cases held, rather, that the first amendment required a remedy no broader than necessary to eliminate the deception.⁹⁸

The court's statement that it was unable to determine that the order was not the least restrictive in light of practices alleged⁹⁹ ignores the fact that less drastic alternatives were proposed but rejected without explanation.¹⁰⁰ As the dissent noted, the affirmative disclosure order requiring specific wording, type size and format is too harsh a remedy to be seriously considered the least restrictive.¹⁰¹ By failing to review more stringently the Commission's order to determine if it was broader than necessary, the Seventh Circuit has abrogated *Britannica's* first amendment protection and has imposed a chilling effect on commercial speech not anticipated by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁰²

The Seventh Circuit should have examined the FTC's order in light of the Supreme Court's reasoning in according commercial speech only limited protection. *Virginia State Board* distinguished commercial speech by its harshness, calculated nature, and relative ease of verification from other types of speech traditionally protected by the first amendment. These unique characteristics make some regulation appropriate, the Court stated, because it is unlikely that commercial speech will be chilled or "foregone entirely."¹⁰³ Yet, the ruling in *Encyclopaedia Britannica* could effect either result.¹⁰⁴ If

97. See generally Elman, *supra* note 5. See also note 34 *supra*.

98. See Elman, *supra* note 5, at 210.

99. 605 F.2d at 973.

100. Because the selling practices in question do not give rise to false beliefs on the part of the product's purchaser which linger after the practices in question have been terminated, a cease and desist order coupled with some type of affirmative disclosure in advertising would have sufficed to eliminate any inherent deception. *But cf. Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (noting that the remedial suggestions of the violator should be given little consideration).

101. Justice Wood stated: "The Commission surely has more compelling responsibilities than to dictate the size, wording, and printer's type to be used inflexibly by the company." 605 F.2d at 977 (Wood, J., dissenting).

102. 425 U.S. 748 (1976).

103. *Id.* at 771.

104. American Home Products Corp., the maker of Anacin, has been ordered by the FTC to spend \$24 million in advertising stating that "Anacin is not a tension reliever." American Home Products Corp., [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,465 (1978). The company recently stated that such advertising could be ruinous in light of the competitive nature of the pain-reliever market and indicated it might stop advertising entirely if the order is subsequently affirmed. Giges, *Anacin May Stop Ads Rather Than Run Correctives*, Advertising Age, Nov. 5, 1979, at 1.

advertisements containing the affirmative disclosure prove detrimental to its marketing efforts, the company might stop advertising altogether. For the same reason, Encyclopaedia Britannica might seek alternative distribution channels to circumvent the card-at-the-door requirement. Had the court of appeals looked beyond the Supreme Court's statement that some regulation of commercial speech is appropriate, it could not have condoned the inherent chilling effect of the extensive remedial order entered in *Encyclopaedia Britannica*. Modification of the order would have rendered it constitutionally valid and consistent with the Seventh Circuit's recent decision in *Egg Nutrition* requiring an order to be no broader than necessary to eliminate deception.¹⁰⁵

A further weakness of *Encyclopaedia Britannica* stems from the court's approval of the FTC's decision to proceed against Britannica individually. Although the court followed strong precedent in deferring to the Commission's discretion to enter an order against a single member of an industry, the court should not have affirmed the action of the Commission without evaluating the devastating economic impact the FTC order might have.¹⁰⁶ If the economic impact had been considered, the court would have found that the FTC had acted arbitrarily.¹⁰⁷ Although the commission has proceeded against two competitors of Britannica, seeking to impose on one a similar order and enforcing against the other a less stringent order, a number of Britannica's competitors remain free to engage in the practices the Commission found deceptive.¹⁰⁸ Moreover, had the Commission proceeded against the industry as a whole, the ultimate beneficiary of the FTC's action, the consumer, would have been better protected from the allegedly unlawful selling practices. Although ideally the Commission should have proceeded against the entire industry through its rulemaking authority, in light of strong precedent counseling deference to the Commission's discretion, the prudent course would have been for the court to have modified the order. The imposition of an effective but less stringent remedy would have not only lessened the economic impact of the order but would have conformed it to statutory and first amendment requirements.

IMPACT OF *ENCYCLOPAEDIA BRITANNICA*

The ruling in this case has far reaching implications for businesses subject to the FTC's jurisdiction, particularly those ordered to make affirmative disclosures. The decision allows the Commission to impose strong remedial

105. 570 F.2d 157 (7th Cir. 1977).

106. If the economic consequences of complying with a Commission order threaten the continued existence of the company subject to the order, the Commission, in imposing such a remedy, is acting contrary to its mandate to protect competition as well as consumers.

107. See cases cited in notes 36-39 and accompanying text *supra*.

108. See notes 73 & 74 *supra*. The record of prior FTC action taken against publishing companies engaged in direct selling amply demonstrates the magnitude of the problem. Prior to 1968, 41 orders were entered against 37 different companies. *American Marketing Associates, Inc.*, 73 F.T.C. 213, 224-25 (1968).

measures without demonstrating the necessity for, or efficacy of, such action. If *Encyclopaedia Britannica* signals a trend, businesses subject to Commission orders will have little chance of obtaining economically feasible remedial solutions. More importantly, the Commission's readiness to invoke affirmative disclosure coupled with the court's willingness to uphold such sanctions indicate a regulatory environment increasingly hostile to adopting the least restrictive remedy or to considering the economic consequences involved. That an order can be affirmed without any analysis of the potentially disastrous economic results of compliance is perhaps the most significant aspect of the court's ruling.¹⁰⁹

In addition, the court's decision has further refined the constitutional protection afforded commercial speech.¹¹⁰ The standard established in previous cases provides that a remedy, even for misleading advertising, may go no further than necessary in correcting the deception. Apparently, in the Seventh Circuit this constitutional standard will be applied only under limited factual circumstances. The possibility that future orders will dictate format and wording difficult to adapt to standard business practices is greatly enhanced. Although this may arguably increase the efficacy of the particular remedy imposed, companies may hesitate to advertise to avoid the consequences of running afoul of the FTC. Thus, as a result of the court's approval of the FTC's action, there is an increased likelihood that commercial speech protected by the first amendment will be chilled.

CONCLUSION

Encyclopaedia Britannica has extended the affirmative disclosure remedy to a situation totally unsuited to this type of corrective action. In the context of direct selling, the consumers affected by the allegedly deceptive practices are unlikely to be subject to any continuing misrepresentation. Thus, an order simply requiring *Encyclopaedia Britannica* to cease and desist from the practices in question would have been effective in eliminating the deception. Instead, the court upheld affirmative disclosure provisions which are particularly harsh and burdensome, and which closely resemble corrective advertising because the required advertising and warning card will convey a negative connotation.

Further, the FTC has imposed, and the court has upheld, a sanction on a single member of an industry which is not only severe when viewed individually, but ruinous when viewed in a competitive setting. In affirming the FTC, the court deferred to the discretion of the Commission on every issue raised. While courts often give great weight to the expertise of the Commission in determining what practices are deceptive or unfair, and in fashioning remedies, the reviewing function of a court cannot be undertaken in a vacuum. The economic and competitive interests at stake can only be assured

109. See Guroi & Mann, *supra* note 15.

110. See Elman, *supra* note 5. Cf. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

adequate protection when the reasonable relation test and constitutional safeguards are applied to insure that remedial orders go no further than necessary to correct the alleged violation. Reviewing courts should not hesitate to modify or remand to the Commission orders that are excessive in achieving the desired effect. At the very least, courts should carefully scrutinize the record relied on by the Commission before allowing such orders to stand. The courts need not expand their authority to assume a more vigilant posture; they need only look to a substantial body of case law and to the first amendment. In short, the court erred in refusing to modify the challenged order and in so doing has raised serious doubt as to the ability of future petitioners to safeguard viable business interests.

Anne S. Jordan

